

**IN THE IOWA DISTRICT COURT FOR CRAWFORD COUNTY**

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STATE OF IOWA, ex rel., IOWA )  
DEPARTMENT OF NATURAL )  
RESOURCES (99AG23542), )

Plaintiff, )

vs. )

DONALD PATRICK "PAT" KELLY d/b/a )  
KELLY CONSTRUCTION, )

Defendant. )

**LAW NO.** \_\_\_\_\_

**PETITION AT LAW**

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COMES NOW Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources ("DNR") and for its claims against Defendant Donald Patrick "Pat" Kelly d/b/a Kelly Construction ("Kelly") states as follows:

**Introduction**

1. The release of petroleum from underground storage tanks ("USTs") is a substantial public concern because it threatens public health and safety and the natural resources of the state. Kelly violated petroleum UST requirements at a site located at 711 South 12<sup>th</sup> St., Denison, Iowa, by failing to permanently close USTs, and failing to pay an administrative penalty. The State of Iowa, therefore, brings this action seeking assessment of a civil penalty, issuance of a permanent injunction, and enforcement of an administrative order against Kelly.

**Parties**

2. The State of Iowa is a sovereign state of the United States of America and brings this action on behalf of the DNR, a duly constituted agency of the State of Iowa. *See* Iowa Code § 455A.2 (2005).

3. Kelly is a resident of Harrison County, and does business in Crawford County as Kelly Construction.

### **Jurisdiction**

4. The DNR is authorized to regulate underground storage tanks (“USTs”) containing regulated substances, including petroleum products, and to adopt rules relating to detection, prevention and correction of releases of regulated substances from such tanks. Iowa Code §§ 455B.471- 479 (2005).

5. The Environmental Protection Commission (“EPC”) is authorized to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, and corrective action applicable to all owners and operators of USTs. Iowa Code § 455B.474. The UST rules adopted by the EPC are contained in 567 Iowa Admin. Code chapters 135 and 136.

6. An “owner” of a UST is a person who owns the UST used for the storage, use, or dispensing of petroleum products. *See* Iowa Code § 455B.471(6)(a); 567 Iowa Admin. Code 135.2.

7. An “operator” of a UST is a person in control of, or having responsibility for, the daily operation of the UST. Iowa Code § 455B.471(5); 567 Iowa Admin. Code 135.2.

8. A UST must be permanently closed if it has been out of operation for more than twelve months. 567 IAC 135.15(1)(c).

9. To permanently close a UST, owners and operators must empty and clean them by removing all liquids and accumulated sludge, and either remove the UST from the ground or fill it with an inert solid material. 567 IAC 135.15(2)(b).

10. The DNR must be given notification of the date of the scheduled permanent closure prior to the closing. 567 IAC 135.15(2)(d).

11. Owners or operators must measure for the presence of a release where contamination is most likely to be present at the UST site during the process of permanently closing the UST. 567 IAC 135.15(3)(a)-(d).

12. For all permanent tank closures, at least one water sample must be taken from the first saturated groundwater zone via a monitoring well or borehole. 567 Iowa Admin. Code 135.15(3)(b).

13. If contaminated soils or groundwater are discovered, owners and operators must comply with the corrective action requirements contained in 567 IAC 135.7-135.12. 567 IAC 135.15(3)(g).

14. A closure report must be submitted to the DNR within 45 days of a UST removal. 567 IAC 135.15(3)(e).

15. Within 90 calendar days after a release of petroleum from a UST is confirmed, or another reasonable period of time determined by the DNR, owners and operators must submit a Tier 1 site assessment report to the DNR. 567 IAC 135.9(11)(a).

16. A “Tier 1 site assessment” is the evaluation of a site for the purpose of determining the concentrations of chemicals associated with a petroleum release and an accurate identification of the risks to human health and the environment. 567 IAC 135.9(1).

17. All assessment, corrective action, data analysis and report development must be conducted by or under the supervision of a certified groundwater professional. 567 IAC 135.8(2).

18. A Tier 2 site assessment must be conducted and a site cleanup report submitted for all sites which are not classified as “no action required” during the Tier 1 process. 567 IAC 135.10(1).

19. A Tier 2 site cleanup report must be submitted within 180 days of the date the DNR approves or is deemed to approve a Tier 1 assessment report under 567 IAC 135.19(12). 567 IAC 135.10(11)(a).

20. The DNR director is authorized by Iowa Code section 455B.476(1) to enforce the requirements of Iowa Code chapter 455B, Division IV, part 8, and rules adopted thereunder, by issuance of an administrative order directing a violator to desist in the practice which constitutes a violation, and to take necessary corrective action to ensure that the violation will cease. The director may also impose appropriate administrative penalties. Iowa Code §§ 455B.109, 455B.476(1).

21. A person who violates a provision of Iowa Code chapter 455B, Division IV, part 8, or rule or order issued thereunder is subject to a civil penalty not to exceed five thousand dollars (\$5,000.00) for each day during which the violation continues. Iowa Code § 455B.477(1).

22. The Attorney General, at the request of the DNR director with approval of the EPC, shall institute any legal proceedings, including an action for injunction, necessary to enforce the penalty provisions of Iowa Code chapter 455B, Division IV, part 8, or to obtain compliance with the provisions of said part or the rules or orders issued thereunder. Iowa Code § 455B.477(3).

### **Facts**

23. In September 1989, Kelly registered with the DNR as the owner of one 500-gallon petroleum UST located at 711 South 12<sup>th</sup> Street, Denison, Iowa. Kelly operated the UST under the name “Kelly Construction.”

24. Kelly had control of, and responsibility for, the daily operation of the UST.
25. On September 30, 1997, Kelly submitted a notification of temporary closure of the UST. Kelly certified the UST had been temporarily closed since 1992.
26. Kelly also submitted to the DNR on September 30, 1997, a tank closure notification form indicating he intended to remove the UST.
27. On October 14, 1997, the DNR sent a letter to Kelly informing him it received notice of the UST closure, and enclosed guidance for the closure of the tank. The DNR directed Kelly to give oral confirmation of the closure date 24 hours prior to the actual closure. The DNR also directed Kelly to submit a closure report to the DNR within 45 days of the closure. No notice was given to the DNR of the UST closure, and no closure report was submitted to the DNR.
28. On June 9, 1999, the DNR sent a certified letter to Kelly informing him of the overdue closure report. Kelly was again directed to submit a closure report to the DNR within 60 days. The DNR received no response.
29. On September 7, 1999, a certified letter was sent to Kelly directing him to permanently close the UST before December 22, 1999. The DNR directed Kelly to submit a completed notification of closure form within 30 days of receipt of the letter.
30. On October 26, 1999, the DNR received a notification of tank closure form dated October 19, 1999, from Kelly. This notice ambiguously indicated that the tank would be removed, or had been removed, on March 15, 1999.
31. On February 9, 2000, the DNR sent Kelly a letter informing him the closure notification had been received, and enclosed guidance for the UST closure.

32. On May 9, 2000, a certified letter was sent to Kelly informing him a closure report had not been received by the DNR, and it directed him to provide a response within 60 days upon receipt of the letter.

33. On February 4, 2002, a Final Notice to permanently close the UST was sent to Kelly informing him that since the UST was not permanently closed, the matter would be referred to the DNR legal section for enforcement actions including assessment of a penalty.

34. On October 21, 2003, the DNR director issued Administrative Order 2003-UT-17 to Kelly. A copy of the Order is attached hereto as Exhibit A, and by this reference is incorporated herein. The Order required Kelly to perform the following:

- a. permanently close the USTs in conformance with DNR rules within 45 days;
- b. conduct a soil and groundwater investigation and submit a closure report within 60 days;
- c. provide a copy of a written contract to the DNR of the qualified contractor chosen to close the USTs within 14 days;
- d. pay to the DNR an administrative penalty of \$1,860.00 within 60 days for violations of DNR UST rules.

35. The Administrative Order was sent to Kelly, by certified mail, on October 23, 2003; however, the Order remained unclaimed after three notices.

36. Kelly was personally served with Administrative Order 2003-UT-17 on April 23, 2004, by a Harrison County Deputy Sheriff, and did not appeal the order. A copy of the proof of service is contained on the last page of Exhibit A.

37. Kelly did not perform any of the actions required by Administrative Order 2003-UT-17. He did not pay the delinquent tank management fee, any of the penalty imposed, or any of the accrued interest on that penalty.

### **Violations**

38. Kelly failed to permanently close USTs in violation of Administrative Order No. 2003-UT-17 and 567 Iowa Admin. Code 135.15(1)(c), 135.15(2)(d).

39. Kelly failed to pay the \$1,860.00 administrative penalty, or any of the accrued interest on that penalty, in violation of Administrative Order 2003-UT-17.

WHEREFORE, Plaintiff State of Iowa ex rel., Iowa Department of Natural Resources requests that the Court:

- a. assess a civil penalty against Kelly pursuant to Iowa Code section 455B.477(1) (2005) for each day of violation of Administrative Order No. 2003-UT-17, 567 Iowa Admin. Code 135.15(1)(c) and 135.15(2)(d) not to exceed five thousand dollars (\$5,000) for each day of violation;
- b. order Kelly to pay the administrative penalty of one thousand eight hundred sixty (\$1,860.00) imposed by Administrative Order No. 2003-UT-17, plus accrued interest pursuant to Iowa Code section 455B.109(3) (2005); and
- d. issue an order permanently enjoining Kelly from any further violation of Administrative Order No. 2003-UT-17, 567 Iowa Admin. Code 135.15(1)(c) and 135.15(2)(d), and further requiring Kelly to:
  - (1) within 10 days, submit to the DNR the name of the certified groundwater professional retained to complete the UST closure and environmental assessment activities required by this order;
  - (2) within 45 days, permanently close the USTs in conformance with DNR rules and submit a closure report to the DNR;
  - (3) in the event contaminated soil or groundwater is encountered during the closure of the USTs, complete a Tier 1 site assessment and submit a Tier 1 report to the DNR within 90 days of the UST closing; and

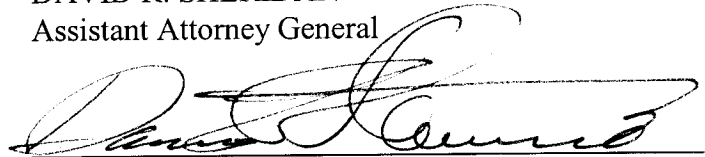
- (4) in the event the DNR approves or is deemed to approve the Tier 1 assessment report, and a no action required classification is not obtained, within 180 days of the approval complete a Tier 2 site assessment and submit to the DNR a Tier 2 site cleanup report as provided in 567 Iowa Admin. Code 135.10.

Plaintiff further requests such other relief the Court may deem just and proper and that the Court tax the costs of this action to the Defendant.

Respectfully submitted,

THOMAS J. MILLER  
Attorney General of Iowa

DAVID R. SHERIDAN  
Assistant Attorney General

A handwritten signature in black ink, appearing to read "David S. Steward", written over a horizontal line.

DAVID S. STEWARD, PK1024804  
Assistant Attorney General  
Environmental Law Division  
Lucas State Office Building  
321 E. 12<sup>th</sup>, Room 18  
Des Moines, Iowa 50319  
TEL: (515) 281-5351  
FAX: (515) 242-6072  
E-MAIL: dstewar@ag.state.ia.us

ATTORNEYS FOR PLAINTIFF



# IOWA DEPARTMENT OF NATURAL RESOURCES

## ADMINISTRATIVE ORDER

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**IN THE MATTER OF:**

**PAT KELLY, d/b/a, KELLY  
CONSTRUCTION.**

**UST NO. 8916456**

**ADMINISTRATIVE ORDER  
NO. 2003-UT- 17**

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**TO: Kelly Construction  
Pat Kelly  
1807 Panora Ave.  
Woodbine, IA 51579**

### I. SUMMARY

This order requires you to do the following:

- Permanently close underground storage tank (UST) by removal or filling in place within forty-five (45) days of receipt of this order. In the alternative, provide written certification that the UST has been removed within fourteen (14) days of receipt. Certification shall include a written statement as to when the UST was removed, the contractor who removed it and the disposition of the tank.
- Conduct a soil and groundwater closure investigation and submit a closure report within sixty (60) days of receipt of this order.
- Pay to the order of the Department an administrative penalty of \$1,860.00 within sixty (60) days of receipt of this order unless the order is appealed within thirty (30) days as provided in Division VII below.

Any questions regarding this order should be directed to:

**Relating to technical requirements:**

Tom Collins  
Iowa Department of Natural Resources  
401 S.W. 7<sup>th</sup>, Suite I  
Des Moines, Iowa 50309  
Ph: 515/281-8879

**Relating to appeal rights:**

David Wornson  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: 515/242-5817



# IOWA DEPARTMENT OF NATURAL RESOURCES

## ADMINISTRATIVE ORDER

<b>IN THE MATTER OF:</b>  <b>PAT KELLY, d/b/a, KELLY CONSTRUCTION.</b>  <b>UST NO. 8916456</b>	<b>ADMINISTRATIVE ORDER NO. 2003-UT-</b>
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**TO: Kelly Construction  
Pat Kelly  
1807 Panora Ave.  
Woodbine, IA 51579**

**Kelly Construction  
Pat Kelly  
711 South 12<sup>th</sup> St.  
Denison, IA 51442**

### I. SUMMARY

This order requires you to do the following:

- Permanently close underground storage tank (UST) by removal or filling in place within forty-five (45) days of receipt of this order. In the alternative, provide written certification that the UST has been removed within fourteen (14) days of receipt. Certification shall include a written statement as to when the UST was removed, the contractor who removed it and the disposition of the tank.
- Conduct a soil and groundwater closure investigation and submit a closure report within sixty (60) days of receipt of this order.
- Pay to the order of the Department an administrative penalty of \$1,860.00 within sixty (60) days of receipt of this order unless the order is appealed within thirty (30) days as provided in Division VII below.

Any questions regarding this order should be directed to:

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**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER  
Pat Kelly d/b/a Kelly Construction**

**II. JURISDICTION**

This order is issued pursuant to Iowa Code §§455B.474(1)(f)(10) and 455B.476, which authorize the Director to issue any order necessary to secure compliance with the Iowa Code Division IV, Part 8 and Department rules contained in Chapter 567 I.A.C. 135. Iowa Code section 455B.109, section 455B.476 and agency rules in Chapter 567 I.A.C. 10 authorize the Director to assess administrative penalties up to \$10,000.

**III. STATEMENT OF FACTS**

1. Pat Kelly registered with the Department in September 1989 as the owner of one petroleum underground storage tank (UST) located at 711 South 12<sup>th</sup> Street Denison, Iowa. This UST did not meet the upgrade standards required by Department rules. Pat Kelly has been the owner and operator of the UST at all times relevant to this order.
2. Mr. Kelly submitted a notification of temporary closure form dated September 3, 1997. He certified in this form that the tanks had been temporarily closed since 1992.
3. Mr. Kelly submitted to the Department a tank closure notification form dated September 30, 1997. By letter dated October 14, 1997, the Department acknowledged receipt and enclosed guidance for the closure of the tank and required oral confirmation of the closure date be given to the Department 24 hours prior to the actual closure. It also required a closure report be submitted to the Department within 45 days of the tank system removal. No closure report was submitted to the Department within the above stated time period.
4. On July 2, 1998, the Department sent Kelly Construction a Notice of Revocation of Tank Tags by certified mail informing him that tank tags would not be issued until proof of financial responsibility was provided and requiring certification of the status of the tank. The Department received no response.
5. On June 9, 1999, Mr. Kelly received a certified letter from the Department informing him of the overdue closure report for the above referenced UST. The closure report was again requested and Mr. Kelly was given 60 days upon receipt of the letter to submit it. The Department received no response.
6. On September 7, 1999, a certified letter was sent to Kelly Construction. This letter informed Kelly Construction that permanent closure of the temporarily closed UST was required. The company was given until December 22, 1999, to complete closure of the tank. The Department requested that a completed notification of closure be returned to the Department within 30 days of receipt of this letter.
7. On October 26, 1999, the Department received a notification of tank closure dated October 19, 1999 from Pat Kelly. This notice ambiguously indicated that the tank would

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER  
Pat Kelly d/b/a Kelly Construction**

be removed or had been removed in "March 1999." It is not clear if the tank had been removed or the intention was to remove it in March of 2000.

8. On February 9, 2000, the Department sent Mr. Kelly a letter informing him that the above referenced closure notification had been received. This letter also contained guidance as to the necessary steps to complete permanent closure or tank removal.

9. On May 9, 2000, a certified letter was sent to Kelly Construction stating that a closure report had not yet been received and outlining what such a report should contain. Response was required within 60 days upon receipt of this letter.

10. On February 4, 2002, a Final Notice was sent to Kelly Construction. This notice informed Kelly Construction that the tank located at the above referenced property should have been permanently closed by the upgrade deadline, December 22 1998. Since the site has not yet been permanently closed, the matter will be referred to the legal Department for further enforcement including assessment of a penalty. Unless the Notification of Closure form is completed and returned to the Department within 10 days upon receipt of this letter and a closure report is submitted to the Department within 60 days. The Department has received no further response from Kelly Construction.

11. A memo from the field office dated February 26, 2002, notes that in December of 2001 Pat Kelly told a DNR Field office employee that the tank was removed in 1998 or 1999. Mr. Kelly also stated that Omaha testing ran samples, but that he had no record of the test results. The DNR inspector noted that he could not observe any surface evidence that the UST had been removed. There has been no further contact between the Department and Kelly Construction.

#### **IV. CONCLUSIONS OF LAW**

1. Iowa Code chapter 455B, Division IV, Part 8 (§§ 455B.471 - 455B.479) establishes the Underground Storage Tank (UST) program. Section 455B.472 declares that the release of regulated substances, including petroleum products, from underground storage tanks constitutes a threat to the public health and safety and to the natural resources of the state. Iowa Code § 455B.474 authorizes the Environmental Protection Commission to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, and corrective action applicable to all owners and operators of USTs. The Commission has adopted such rules at Chapters 567 I.A.C. 135 and 136.

2. Iowa Code § 455B.471(6) defines "owner" of underground storage tanks. These USTS were in service after July 1, 1985. Pat Kelly d/b/a Kelly Construction is an owner as defined and responsible for taking the corrective action as required by this order.

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER  
Pat Kelly d/b/a Kelly Construction**

3. Iowa Code § 455B.471(5) defines an "operator" of underground storage tanks as "... a person in control of, or having responsibility for, the daily operation of the underground storage tank." Pat Kelly d/b/a Kelly Construction is an operator as defined and responsible for taking the actions required by this order.

4. Tanks that have been temporarily closed for more than 12 months must be permanently closed by removal or filling in place unless the system meets and continues to meet tank performance and upgrade standards. See 567 IAC 135.15(1)"b". The Department may grant an extension of the temporary closure period. The tank closure process requires prior notice and a soil and groundwater closure investigation report. The referenced UST does not meet tank upgrade standards.

5. Pat Kelly has failed to document that the tank has been removed and has failed to conduct a tank closure investigation in violation of the tank closure rules. He is required to permanently close the UST by removal or filling in place, complete a soil and groundwater investigation and submit a closure report in accordance with Department rule 135.15.

**V. ORDER**

THEREFORE, you are ordered to comply with the following provisions in order to cease, abate, and redress the above-cited violations:

1. Permanently close underground storage tanks (USTS) by removal or filling in place within forty-five (45) days of receipt of this order. You are required to submit a notice of tank closure form and provide oral notice to the Department at least 24 hours prior to any tank closure or sampling activities. In the alternative, provide written certification that the UST has been removed within fourteen (14) days of receipt of this order. Certification shall include a written statement as to when the UST was removed, the contractor who removed it and the disposition of the tank.

2. Conduct a soil and groundwater closure investigation and submit a closure report within sixty (60) days of receipt of this order in accordance with Department rule 135.15

3. Submit within fourteen (14) days of receipt of this order a copy of a written contract with a qualified contractor the terms of which provide for closure of the tank and completion of the closure investigation within the timeframes established above and in accordance with Department rules.

4. Pay to the order of the Department an administrative penalty of \$1860.00 within sixty (60) days of receipt of this order unless the order is appealed within thirty (30) days as provided in Division VII below.

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER  
Pat Kelly d/b/a Kelly Construction**

**VI. PENALTY**

1. Iowa Code section 455B.477 authorizes the assessment of civil penalties in Iowa District Court of up to \$5000.00 per day of violation for the violations involved in this matter.

2. Iowa Code section 455B.109 and 455B.476 authorize the Environmental Protection Commission to establish by rule a schedule of civil penalties up to \$10,000.00 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties. See chapter 567--10 of the Iowa Administrative Code (IAC). Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Administrative Order with a penalty. The assessment rationale is as follows although the Department reserves the right to modify the rationale based on additional evidence:

**ECONOMIC BENEFIT:** Assuming the party complies with the terms of this order, he has gained an economic benefit based on the delayed costs of completing closure of these USTS. These USTS should have been removed within 12 months of temporary closure which has been reported to be as early as 1992. Mr. Kelly notified the Department the tank would be closed in the fall of 1997 and has stated the tank was removed in 1998 or 1999. It is not clear if the tank was in fact removed. It is clear that a soil and groundwater investigation has not been completed. The cost of the closure investigation is estimated to be \$750. Assuming the tank was removed by January 1, 1998, the closure investigation and report is approximately 60 months overdue. Applying a monthly interest rate of 0.08 %, the benefit is calculated to be  $(\$750 \times .008 \times 60 = \$360)$  \$360. For this factor, \$360 is assessed.

**GRAVITY:** The USTS at this location have been out of operation since 1992. The duty close them actually arose as early as 1993. The delay in completing the tank closure process and determining if the site has contaminated has been delay for over 9 years. For this factor, \$500 is assessed.

**CULPABILITY:** Mr. Kelly has been notified several times of the duty to close the tanks without response. He has provided no written documentation of a tank removal or a closure investigation. For this factor, \$1,000 is assessed.

**VII. APPEAL RIGHTS**

Pursuant to Iowa Code sections 455B.476, and 561--7.5(1), Iowa Administrative Code (I.A.C.), as adopted by reference by chapter 567--7, I.A.C., a written Notice of Appeal to the Environmental Protection Commission may be filed within 30 days of receipt of this Order. The Notice of Appeal should be filed with the Director of the Department, and must identify the specific portion or portions of this order being appealed and include a short and plain statement of the reasons for appeal. A contested case hearing will then be

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER  
Pat Kelly d/b/a Kelly Construction**

commenced pursuant to Iowa Code chapter 17A and chapter 561--7, Iowa Administrative Code.

**VIII. NONCOMPLIANCE**

Failure to comply with this order may result in the imposition of administrative penalties or referral to the Attorney General to obtain appropriate relief pursuant to Iowa Code sections 455B.476 and 455B.477.

  
\_\_\_\_\_  
JEFFREY R. VONK, DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 21 day of  
October, 2003

Case Name IOWA DEPT.OF NATURAL RESOURCES  
VS. KELLY, PAT DBA KELLY CONST.

Type of  
Service Code

X Personal	1
Dwelling/Substitute	2
Hotel, Boarding/Rooming House	3
Corporation/Association	4
Official (State, County, City)	5
Spouse Away from Residence	6
Other	7
Diligent Search	8

[illegible]

## ORDERS

ORDERS  
KELLY, PAT DBA KELLY CONST. At 1807 PANORA AVE WOODBINE In HARRISON  
County On 4/23/2004 15:08 (1)  
(Name) (Address) (Date) (Time)

FEES CHARGED TO/PAID BY ATTY:

IOWA DEPT NAT'L RESOURCES

MARLA GALLARDO

SERVICE	15.00
MILEAGE	14.40
COPY	
Total	29.40

DATE \_\_\_\_\_ CHECK # 064036-11

T.E. BAXTER, Sheriff

By RANDY D. JENSEN, DEPUTY SHERIFF

Note: Copy of original notice, if served, must be attached to this form.